

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION FIVE**

CHESTERTOWN FOODS, INC.
Employer

and

Case 5-RC-15930

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 27**
Petitioner

DECISION AND DIRECTION OF ELECTION

ISSUES

The overall issue in this matter, with various and distinct sub-issues, is the scope of the unit and whether the unit petitioned-for by the Union is an appropriate unit. The Union seeks to represent certain production employees of the Employer but not all production and maintenance employees. In particular, the Union seeks to exclude the following classifications on the following bases: (1) on the basis of supervisory status, the shift supervisors, the back dock shipping and receiving supervisor, the trainer, the lead packer, the lab technician, and the production clerical; (2) on the basis of community of interest, the lab technician, the lab employee, and the maintenance employees; and (3) on the basis of confidential employee status, the production clerical. The Union also seeks to include “contracted” production employees used by the Employer that are supplied by two personnel agencies; the Union contends that the “contracted” employees are in fact employed solely by the Employer.

CONCLUSIONS

For the reasons that follow in this decision, and after careful consideration of the totality of the record evidence and the Union’s and Employer’s respective factual and legal positions as stated in their post-hearing briefs, I find: (1) the shift supervisors and the back dock shipping and receiving supervisor all to be statutory supervisors; and the trainer, lead packer, lab technician and production clerical not to be statutory supervisors; (2) the lab technician, lab employee, and maintenance employees share a close community of interest with the other production employees that requires their inclusion in the unit; and (3) the production clerical is not a confidential employee and should be included in the unit under established Board policy. Lastly, I find the contracted employees in issue are not solely employed by the Employer; rather, they are supplied by “Asian Connections” and “G.M.M.,” and used by the Employer. Accordingly, under

current Board precedent, they cannot be included in the unit sought by the Union without the clear and unequivocal consent of all employers.¹

During the hearing, the parties stipulated and agreed that an appropriate unit would included the following classifications: APV operators; fat and stock packers; boners; dicers; cookers; poultry loaders; graders; MDM operators; packers; back dock checkers; general laborers; sorters; placers; monitors; pan washers; and coolers.

There are approximately 217 employees in the unit urged by the Union; 138 employees in the unit urged by the Employer; and 134 employees in the unit found appropriate.

There is no history of collective bargaining between this Employer and the Union.

UNION'S POSITION

The Union contends that the production supervisors are supervisors within the meaning of Section 2(11) of the Act on the basis that they have authority to issue verbal and written reprimands and effectively recommend discipline. The Union argues that the trainer is a supervisor within the meaning of Section 2(11) because she impliedly evaluates production employees' performance and those evaluations can result in discipline. The Union asserts the lead packer is a supervisor within the meaning of Section 2(11) because she responsibly directs the packers and assigns them work. The Union avers the plant clerical is a supervisor within the meaning of Section 2(11) because she has the authority to discipline employees. The Union claims generally that the lab technician is a supervisor within the meaning of Section 2(11).

The Union maintains that the lab technician and lab employee should be excluded from any unit found to be appropriate because they lack sufficient of community of interest with the production employees. The Union relies on the amount of time the lab tech and lab employee spend in the microbiology lab; their supervision by the laboratory manager as opposed to production supervisors, and the lack of interchangeability and contact with production employees. Similarly, the Union submits the maintenance employees should be excluded from the unit as they too lack an adequate community of interest with production workers. The Union relies on the absence of common supervision, the difference in the nature of their skills and functions from skills of the production employees, the absence of interchangeability, and the infrequent contacts with production employees.

With respect to the plant clerical, the Union asserts that she is a confidential employee because of her employment responsibilities. The plant clerical assists supervisor Judy Dagenais, Industrial Engineer Manager, and management in general, in

¹ I have read and reviewed carefully the record evidence, exhibits, briefs, and the cited case law carefully. The lack of reference to specific pieces of evidence or case law from my analyses in this Decision and Direction of Election is not, nor should it be construed as, any indication that I have not considered that evidence or case law in reaching my findings and conclusions.

collecting, recording, and maintaining production figures in a database to which only the plant clerical and Dagenais have access. The Union also relies on the role the plant clerical plays as a Spanish-English interpreter between supervisors and employees and the trust confided in her by both managers and employees.

Concerning the contract production employees, the Union argues that the agreements and processes by which the Employer obtains the services of these employees is merely subterfuge and pretext to mask the truth that these contract employees are in reality solely and directly employed by the Employer. The Union does not argue that the contract agencies are the sole and direct employers of these employees; nor does it argue that the contract agencies and the Employer are joint employers of these employees. The Union's position is that the contract production employees have no other employer other than Chestertown Foods, Inc.; accordingly, the consent of the contract agencies is not required for these contract production employees to be included in the unit.

The Union called two witnesses at the hearing: former employees Connie Perez and Carmen Salgado.

EMPLOYER'S POSITION

The Employer counters that the production supervisors are not statutory supervisors because they have no authority to discipline employees or to effectively recommend discipline for employees. Unless minor, all issues, including discipline, must be first approved by the stipulated supervisors, usually the Production Manager or the General Manager. With regard to the trainer, the Employer represents that she possesses no authority to discipline employees, nor does she responsibly direct employees. The Employer's response to the supervisory status of the packing leader is that she does not responsibly direct or assign work to the packers. With respect to the plant clerical, the Employer answers that she has no authority to discipline employees or effectively recommend discipline, and that the source of the Union's mistaken belief in her authority to discipline employees comes from her service as an interpreter between employees and management. Concerning the lab technician, the Employer replies that she possesses no supervisory authority.

The Employer maintains that the lab technician and lab employee share sufficient community of interest with the production employees to require their inclusion in the unit. The Employer points to the time each spends on the production floor or in contact with production employees. The Employer also emphasizes the functional integration of the microbiology lab in the production process. The Employer further maintains that the maintenance employees also share a close community of interest with the production employees, and cites the amount of time the mechanics spend on the production floor, their contact with production employees, their progression from production, and the functional integration of maintenance in the production process.

To rebut the assertion that the plant clerical is a confidential employee, the Employer focuses on her limited role as an interpreter and her limited role in collecting production figures and entering that data into the computer system.

Regarding the contracted production employees, the Employer responds that these employees are employed by the contractors themselves. In support, the Employer emphasizes that it does not pay these employees and underscores that almost all the contracted production employees, except new hires, from the agencies are placed on a production line consisting of only other contracted employees from their respective agency, and each of the two lines is overseen by persons from the respective agency. Thus, Asian Connection employees are on one line and overseen by an Asian Connection leader while G.M.M. employees are on another line and overseen by a G.M.M. leader. The Asian Connection leader is responsible for disciplining Asian Connection employees, while the G.M.M. is responsible for disciplining the G.M.M. employees. As a result, the contract production employees are not employees of Chestertown Foods, Inc., and these employees cannot be included in the unit without the permission of Asian Connection and G.M.M.

The Employer called as its witness General Manager Harry “Jack” Laird.

EMPLOYER’S BUSINESS OPERATIONS

Chestertown Foods, Inc., hereafter Chestertown or the Employer, is a Maryland corporation with an office and places of business in Chestertown, Maryland. The Employer is engaged in the wholesale processing of chicken. The Employer cooks, debones, dices to customer specifications, freezes, and ships chicken meat.

The facility at issue in this matter is a single facility located at 27030 Morgnec Road, Rte. 291, Chestertown, Maryland. The facility is comprised of one main, two-story building and several smaller, outlying buildings. The main building is about 50,000 square feet. On the first floor are the production floor, production office, microbiology lab, label office, loading dock (casually referred to as the “back dock”) packing area, and fabrication shop for maintenance. On the second floor of the main building are supervisors’ offices, sales office, buying office, and accounting office. The smaller outlying buildings consist of an ammonia room, pump house, well houses, scale house, sludge house, fuel house, and a fat and water house.

Chestertown operates three shifts: first shift is from 6:00 a.m. to 4:30 p.m.; second shift is from 4:00 p.m. to midnight; and the third shift is from midnight to 7:30 a.m. Approximately 127 Chestertown employees work first shift. About eight employees work the second shift, and about eight employees work the third shift. First shift produces diced meat, broth, and fat. Second and third shift production is limited to broth and fat. All hourly Chestertown production workers punch the same time clock. All use and share the same cafeteria and restrooms.

In addition to the Chestertown employees on first shift, Chestertown supplements its first shift by contracting employees from two agencies, Asian Connections and G.M.M.² Approximately 134 contracted employees supplied from Asian Connections and G.M.M. work the first shift. These contracted employees work in de-boning, dicing, and packing. No contracted employees work second or third shift. The pay and the benefits, if any, of the contracted employees are provided by Asian Connection or G.M.M. The contracted employees do not use Chestertown's time clock or time card system; rather, their hours are tracked and recorded by their supervisors and Chestertown's production clerk. Asian Connection and G.M.M. bill Chestertown weekly for the labor of the employees supplied by them and used by Chestertown by submitting invoices to Chestertown. The contracted employees do not punch in and out on Chestertown's time clock.

Each shift has a shift supervisor. The Production Manager, Jim Liberatore, supervises the shift supervisors and is responsible for production on all three shifts. The General Manager, Harry "Jack" Laird, is the highest ranking manager at the facility and all of the other managers report to him, including the Production Manager. David Lowary is the supervisor on first shift; Haywood Turner the supervisor on second shift; and Tyrone Reese the supervisor on third shift. Liberatore and Laird work only during the day shift. Turner and Reese are the highest ranking supervisors on their respective shifts.

All three of the shift supervisors have the same authority to issue verbal and written warnings to the Chestertown employees on their shift. Chestertown has a progressive discipline system: verbal warning; written warning; suspension; and discharge. All three shift supervisors have authority to issue verbal warnings to Chestertown employees, without consulting Liberatore or Laird, for infractions enumerated in the employee handbook. The verbal warnings are recorded by the shift supervisor and forwarded by the shift supervisor to human resources. Human resources place the written record of the verbal warning in the offending employee's file. All three shift supervisors also have the authority to issue written warnings to Chestertown employees without consulting with Laird or Liberatore. These written warnings are written by the shift supervisor and signed by the employee and Jack Laird. A copy is also forwarded to human resources for placement in the employee's file. Shift supervisors can only suspend or discharge employees if they first obtain prior approval of Liberatore or Laird; however, they can recommend suspension and discharge. The recommendation would be reviewed by Liberatore or Laird, who may or may not conduct a more complete investigation.

The sales department receives and solicits orders from various businesses for cooked and diced chicken meat. The parties stipulated that the sales department,

² Chestertown contracts with a third agency, Mossberg Sanitation, Inc., which supplies Chestertown with 13 sanitation and cleaning employees. The parties agree that Mossberg is the sole employer of these sanitation and cleaning employees and that Mossberg's 13 sanitation and cleaning employees should be excluded from any unit found appropriate.

including the Director of Sales and the Sales Manager should be excluded from any unit found appropriate based on a lack of community of interest.

The Buying Manager, who also serves as the Office Manager, recommends purchases of chickens which are approved by the General Manager. During the hearing, the parties stipulated that the Buying Manager was a managerial employee and should be excluded from any unit found appropriate.

Shipments of raw, de-feathered, and eviscerated chickens are received at the back dock shipping and receiving area. This area is supervised by back dock shipping and receiving area supervisor Garnett Demby. Demby has the same authority over employees working in back dock as the shift supervisors do over the shift employees. Among the employees who work with Demby are a back dock checker, who performs general shipping and receiving duties, and four forklift operators. Typically, one or two of the forklift operators are assigned to the back dock while the others perform unspecified forklift duties throughout the plant. The number of delivery trucks controls the number of forklift drivers assigned to the back dock. Because the number of delivery trucks dictates the number of forklift drivers, at any given time, Garnett Demby may have one to five employees working in back dock. The forklift drivers assigned to back dock unload the chickens from the delivery trucks.

The unloaded chicken is stored in coolers until is time to be cooked and processed. One or two employees, depending on the product being run, termed poultry loaders or “dumpers” remove the chickens from the cooler and place them in the dumper, a large vat, which dumps the chicken into the cooker. Employees called “cookers” monitor the cooking temperature and cooking time. There are two cookers.

The cooked chicken is then cooled enough that it can be handled by the remaining production employees by going through chillers while the chicken remains on the conveyor belt. Two cooler operators monitor the chiller belts to maintain steady production. The cooled chicken then comes to the “placers.” Placers are employees who place the chickens on the production line for de-boning and dicing. There are four de-boning lines, and one placer for each line.

Approximately 30-35 production employees are on each line of the four lines. The four lines are designated A, B, C, and D. Almost all of the employees assigned to line A are contracted from and supplied by G.M.M.; almost all of the employees assigned to line B are contracted from and supplied by Asian Connections; almost all of the employees assigned to line C are Chestertown employees; and line D is comprised of new employees, both Chestertown and contracted. Employee boners on the production lines de-bone the chicken meat. Line A is headed and supervised by an official of G.M.M. identified as Mike Snum, also known among the employees as “Mr. Mike”; line B is headed and supervised by an official of Asian Connections identified as Cui, also known among the employees as “La China”; line C is supervised by Chestertown’s Floorperson, Virginia “Ginny” Hurtt; and line D is headed and overseen by Chestertown’s boner trainer, Doris Demby. Snum and Cui are responsible for disciplining the employees they

respectively supply. If there is an issue of discipline or quality with respect to a contracted employee, Laird or another Chestertown supervisor will advise Snum or Cui of the issue and Snum or Cui will handle the issue with the offending employee.

During the hearing, the parties stipulated that Hurtt is a supervisor within the meaning of Section 2(11) of the Act and should be excluded from the unit. In addition to supervising line C, Hurtt is also responsible for the production floor in general. In this regard, Hurtt is the first level of supervision for the production floor under the Production Manager, Jim Liberatore. At the hearing, the parties also stipulated to Liberatore's and Laird's status as a statutory supervisors and their exclusion from the unit.

The Employer has one de-boner trainer, Doris Demby, who is responsible for training and helping the new employees on line D in the most efficient way to remove the bones and veins from the meat. On average, the trainer trains new employees for three to four weeks. The trainer also walks around all of the lines and helps or retrains any employee she sees routinely missing bones or veins in the meat, or who gets behind in production. She also fills in on the line for any de-boner who is on break or needs to use the restroom.

The Employer employs six or seven monitors. There are also two monitors who are contracted employees. These monitors, one for each line, walk up and down their respective lines and randomly take a sample of meat, about one pound or less, from each de-boning employee. During first shift, each de-boning employee has approximately four random samples taken from him. The monitors examine the meat for missed bones over a cart placed approximately ten feet from each line. If they find bones in the meat, they go back to the de-boner from whom they took the sample and show him the bones in the meat. The number of samples, pounds of meat, and number of bones for each de-boning employee are recorded and tallied by the monitors and turned in to the production office at the end of the day/each shift. The monitors are supervised by "Ginny" Hurt, Jim Liberatore, or Judy Dagenais.

Judy Dagenais is the Manager of Industrial Engineering. In this capacity, she is responsible for job studies and samplings, studying and improving employee efficiency, checking tare weights of all incoming product, and all other standards checks. Dagenais is the only person in the Industrial Engineering department. Dagenais is also responsible for supervising the de-boning floor and packing. During the hearing, the parties stipulated that Dagenais was a statutory supervisor and should be excluded from any unit found to be appropriate.

The de-boned meat proceeds to employee sorters who by hand go through the meat again looking for bones the de-boners may have missed. There are approximately 17 sorters employed by the Employer.

The meat proceeds to three dicing machines operated by employees termed "dicers." In addition to setting and operating the dicing machines, the dicers also check

the meat one last time for bones. Excluding contracted employees, there are approximately 70 employees, total, employed by the Employer as boners and dicers.

The diced meat then remains on the belt and is run through the freezer three times in order to freeze it before shipping. Unless there is a problem with the freezing process, no employees are involved in freezing the meat.

After freezing, the meat goes through a shaker machine that sizes the meat to specifications by sorting and separating out pieces of chicken meat that are too small or too large and allowing the chicken meat of correct specification to proceed into the scale.

Employees from packing hold bags onto the scale which deposits the meat into the bags. Excluding contracted employees, the Employer employs five packers. Once the correct weight of meat is in the bag, the employee holding the bag passes the bag to another packing employee who tapes the bag and places it on another belt to the pallet area for boxing and shipping. The product is then shipped in 10-pound boxes or 200-pound boxes.

There is one lead packer, Doris Johnson, who is responsible for ensuring that the packers of the diced product are using the correct boxes, making the boxes up correctly, and using the correct labels for the product being packed. The lead packer is supervised by "Ginny" Hurtt and Judy Dagenais. Including contract employees, the lead packer works with approximately five to twelve other packers. A base of five packers is typical. The lead packer does not determine the number of packers. The number of packers is determined by the production schedule, which is made up by the Sales Manager or Director of Sales. The lead packer looks at the production schedule for the number of packers she should have for a given product. She then performs a head count of how many packers she has and reports any shortage or excess of packers to Hurtt or Dagenais. Hurtt or Dagenais will either send her more packers from de-boning or the excess packers will be placed back in de-boning. Hurtt or Dagenais determine which employees work as packers.

The bones from the meat pass through a machine known as the MDM which mechanically separates any meat still attached to the bones. Two MDM operators are responsible for monitoring the MDM machine. The mechanically de-boned meat is then packed and shipped.

The Employer also processes, packs, and ships chicken fat. In cooking the chickens, a certain amount of chicken fat leeches out of the chickens, falls into the water and sinks to the bottom of the cooking vats. After cooking, this water is pumped to a holding tank in one of the outlying buildings. In the holding tank, the fat rises to the top of the water. The water is pumped off, and the fat goes to an evaporator machine, the APV, which evaporates more water out of the fat. There are three APV operators who operate and monitor the APV machine. The fat that remains is packed and shipped. There are six fat and stock packers.

The Employer has a microbiology lab used to test the chicken, plant surfaces, and even employees for bacteria for quality assurance purposes and in accordance with governmental health regulations. The Quality Assurance Manager is Perry Boulter. During the hearing, the parties stipulated that Boulter was a supervisor within the meaning of Section 2(11) of the Act and should be excluded from any unit found appropriate. Boulter supervises the lab technician and the lab employee. The lab is located approximately 20 feet from the production floor.

The lab technician, Pat Warner, is responsible for bacterial testing of the product, the plant surfaces, and even the production employees. The lab technician receives samples of the product collected by operators on the various shifts, the monitors, and the lab employee. About eight to ten samples are brought into the lab in a 24-hour period. The samples are placed by the operators in the refrigerator in the lab. Warner prepares the samples on plates and, after one or two days, reads the sample for a bacteria count of the particular bacteria for which she is performing the test. In the event of any abnormal or anomalous readings, she reports the results to Boulter. Boulter conducts his own tests to verify the results. If the results indicate an unusually high bacteria count, it is Boulter who decides what, if anything, should be done to identify the source and to eradicate it. For example, in the event of a high staph count, Boulter will order swabs be taken of all of the employees to determine which employee is the source of the contamination. While most of her time is spent in the lab, the lab technician also goes out onto the floor to take swabs of various plant surfaces and, when needed, employees.

The lab technician also makes labels for product shipped to customers on the plant's label machine. These labels contain the USDA seal for shipping across state lines, a warning to keep the product frozen, the type of chicken meat packaged in the box, white or dark, and its size. Upon completing the labels, she places them in the label room which is located between the lab and the production office. The labels are picked-up from the label room by the packing area if they were made for diced product or the APV operators if they were made for broth.

Warner has no specialized degree or education. She received sufficient on-the-job training for her to be able to perform her duties. Warner works day shift hours. She is salaried. Because she is salaried her benefits differ from those of the other production employees. She utilizes the same cafeteria and restrooms as the hourly employees.

The lab employee, Beatrice Sisco, is responsible for taking samples of certain product and testing them to confirm they meet quality and regulatory standards. For example, the lab employee takes samples of MDM and checks the bone content to see that it does not exceed the standard for bone content. She also takes samples of another unspecified product to which salt is added and checks the salt content to ensure it meets the standard. She also conducts temperature checks on product at the shipping dock. If the temperature meets the standard, she releases it for shipping. Product cannot be shipped without being tested and released. About half of her time is spent in the lab. All of this data is recorded by her and forwarded to Boulter.

Like Warner, Sisco holds no specialized degree or education. Like Warner, Sisco was given sufficient on-the-job training to enable her to perform her lab duties. Sisco also works day shift. She is an hourly employee. She receives the same level of benefits as the other hourly employees. She utilizes the same cafeteria and restrooms as other hourly employees.

The lab itself is also used by the APV operators to test for moisture in the chicken fat. MDM operators and some of the other equipment operators do their own swabbing of their machines and bring the samples into the lab themselves for testing. The monitors come into the lab at least once a shift, and at least one monitor performs unspecified tests on sampled product in the lab.

The Employer employs one production clerk, Isabelle Alvarez. Alvarez is classified as a production employee, and works under Dagenais. Alvarez works in the production office. Production papers from the various departments are placed daily in a box for Alvarez' daily collection by the production operators. Alvarez tallies the production figures and calculates total production by entering the figures into a database in the computer system and formatting them into a grand production sheet. The grand production sheet lists total production for that day. Dagenais also has access to this database. Other programs used by management have password protection and Alvarez cannot access them.

Alvarez also has a sheet of names of the contract workers who are scheduled to work on any given day, and she checks the list along with Snum and Cui to tally and record the number of contract workers for that day. Alvarez also tracks and records the hours of the contract workers so the amount billed to Chestertown from Asian Connections and G.M.M. can be verified. She similarly tracks and records the presence and hours of Chestertown employees. After obtaining the figures, Alvarez turns them over to Dagenais.

Alvarez is also used by Dagenais and other supervisors as a Spanish-English/English-Spanish translator. Management has used Alvarez as a translator to inform employees of discipline, aid them in investigating work-related issues, and reading various work related notices to employees. Management also relies on two or three other employees, at least one of whom is a Chestertown janitorial employee, for translation services.

Alvarez is paid hourly. She earns more than the boners but less than the APV operator. She punches the same time clock as the other hourly production employees, and she utilizes the same restrooms and cafeteria. When there is a shortage of sorters on the production floor, Alvarez also fills in as a sorter. On a given day, Alvarez spends about half of her time in the production office and half of her time on the production floor.

Two office or accounting clericals are employed by Chestertown. One office clerical, Virginia Fox, is responsible for general ledger. She posts disbursements, tracks

and records inventory, and handles and processes all of the billing. Another office clerical, Patty Santiago, is responsible for accounts receivable. Almost all of their working time is spent in the accounting office on the second floor. Santiago spends some working time out of the office to distribute payroll checks to employees and to review insurance benefits with them. Both office clerks are supervised by Wiest. Both clerks are salaried. During the hearing, the parties stipulated that the general ledger and accounts receivable clericals are office clericals and do not share a community of interest with the production employees such that their exclusion from any unit found appropriate is warranted.

Chestertown employs approximately eight maintenance employees. The maintenance employees are supervised by Lawrence Coleman. During the hearing the parties stipulated and agreed that Coleman is a statutory supervisor and should be excluded from the unit. In Lawrence's absence, Liberatore will supervise the maintenance employees. Five of the maintenance employees work first shift; one works the second shift; and two work the third shift. The maintenance employees also regularly work weekends. Their hours are assigned by Lawrence.

The maintenance employees spend most of their working time on the production floor. They begin work approximately an hour to an hour and a half before the production employees. During this time, they test run the main production equipment in order to ascertain that it is in proper working order before production begins. During this time, they will also perform any preventative maintenance work such as lubricating the equipment. During the production shifts, the maintenance employees are generally required to remain on or in close proximity to the production floor so as little production time is lost in the event of a breakdown. While on the floor during production, they generally monitor the equipment and perform miscellaneous production tasks like collecting and forwarding production papers. They also frequent the outlying building to check on the status of the equipment in those buildings like the boiler, for example, for which they are also responsible for starting-up and running. A maintenance shop is located on the first floor of the main building behind the production floor. The maintenance employees work there only when are actually engaged in fabricating a component or piece of equipment.

When problems with production equipment arise on the floor, maintenance employees are approached or contacted directly by the equipment operators, or by supervisors if the problem concerns the de-boning lines, who directly apprise them of the problem. If they are not on the production floor, they are contacted by radio which they carry and which are strategically located throughout the plant.

There are four classifications of mechanics: A, B, C, and D. A classification is the most skilled and D classification is the least skilled, casually referred to as a helper. In terms of their skills, they are diversified in that each possesses varied degree of general mechanic skill but each has an area of expertise as well: two of them are more experienced in electrical work than the others; three are more experienced in welding; two are more experienced with starting and monitoring the boiler; and one is more

experienced in refrigeration, though major refrigeration maintenance is contracted out. Of the three welders, one is classified as A and two as B. The electricians are classified as B. Of the two responsible for the boiler, one is classified as A and the other C. The one responsible for refrigeration is classified as B. Only two of the maintenance employees has had outside technical training or education, but this is not required by Chestertown. None of them are licensed. At least one of them progressed from production to become a maintenance employee. All of them are paid hourly. The C and D levels of classification earn an hourly rate comparable to the equipment operators while the higher level classifications, B and A, earn more than the equipment operators. All maintenance employees enjoy the same benefits as the hourly employees, and all share the cafeteria and restrooms with the production workers.

Approximately seven employees are classified as janitors or general laborers. While cleaning and sanitation of the plant is contracted out to Mossberg Sanitation, Inc., these employees perform miscellaneous clean-up duties such as sweeping the production floor and removing and discarding pieces of product from the floor. One of them, the pan washer, is responsible for washing and sanitizing pans.

SUPERVISORY STATUS ISSUES

Section 2(11) of the Act, 29 U.S.C. Section 152, provides:

The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be read in the disjunctive; the possession of any one of the authorities listed is sufficient to place an individual invested with this authority in the supervisory class. *Mississippi Power Co.*, 328 NLRB 965, 969 (1999), citing *Ohio Power v. NLRB*, 176 F.2d 385, 387 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). Applying Section 2(11) to the duties and responsibilities of any given person requires the Board to determine whether the person in question possesses any of the authorities listed in Section 2(11), uses independent judgment in conjunction with those authorities, and does so in the interest of management and not in a routine manner. *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981). Thus, the exercise of a Section 2(11) authority in a merely routine, clerical, or perfunctory manner does not confer supervisory status. *Chicago Metallic Corp.*, 273 NLRB 1677 (1985). As pointed-out in *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970), cited in *Hydro Conduit Corp.*: "the Board has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect." See also *Quadrex Environmental Co.*, 308 NLRB 101, 102 (1992).

In this regard, employees who are mere conduits for relaying information between management and other employees are not statutory supervisors. *Bowne of Houston*, 280 NLRB 1222, 1224 (1986).

The party alleging an individual is a statutory supervisor bears the burden of establishing that individual's supervisory status. *NLRB v. Kentucky River Community Care, Inc.*, 121 S. Ct. 1861, 1867 (2001). Conclusory evidence, "without specific explanation that the [disputed person or classification] in fact exercised independent judgment," does not establish supervisory authority. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). Similarly, it is an individual's duties and responsibilities that determine his or her status as a supervisor under the Act, not his or her job title. *New Fern Restorium Co.*, 175 NLRB 871 (1969).

Shift and Back Dock Supervisors

I find that the Union has met its burden of establishing the supervisory status of shift supervisors Lowary, Turner, and Reese, and back dock shipping and receiving supervisor Garnette Demby, and will exclude them from the unit. My finding is based on the authority of all of these supervisors to issue verbal and written warnings to the Chestertown production employees.

At the hearing, Chestertown General Manager Laird testified that all four of these individuals possessed the same level and degree of authority. It is undisputed that all four possess the authority to issue verbal warnings to production employees upon observing them violate a work rule or policy enumerated in the employee handbook. When issuing a verbal warning, they also document the verbal warning in writing and forward it to human resources which places the verbal warning in the offending employee's personnel file. There is no prior approval for, or subsequent assessment of, the verbal warnings by any supervisor above them in the Employer's hierarchy.

Similarly, it is undisputed that all four individuals have the same authority to issue written discipline to employees upon observing infractions of company policy. They write up the written discipline, have the employee sign it, and forward it to Laird for his signature. In every case, Laird signs the written discipline without any independent investigation or assessment. There is no prior consultation with, or approval by, Laird, or any other supervisor above them, before they issue a written warning. There is no subsequent investigation by Laird, or any other supervisor above them, after they issue a written warning. The written warnings by these individuals can also reference suspension and discharge for further, repeated infractions. They forward the written warning to human resources which places the warning in the offending employee's file. They can also send employees home pending investigation and further discipline.

In the context of the Employer's progressive discipline system and the facts present here, I am persuaded that these four individuals are supervisors under the Act. See *Progressive Transportation Services, Inc.*, 340 NLRB 1044 (2003). Cf. *Ken-Crest Services*, 335 NLRB 777 (2001).

Trainer

I do not find that the Union has met its burden of establishing the supervisory status of the trainer. In addition to her duties training employees in the most efficient way to de-bone chicken meat, the trainer also walks around all of the lines to aid de-boners who she sees missing bones and those who are getting behind in production. The Union asserts that by assisting the de-boners in this way, she is non-verbally asserting and marking which de-boners have quality or efficiency problems. In making her determination of which de-boners need her aid, the Union argues she is exercising independent judgment.

I disagree. The trainer is responsible for training the de-boners in the most efficient way as approved by the Employer. She has expertise and experience in a routine function. Any judgment she exercises is routine and the result of her greater experience. While there may be a theoretical potential that de-boners she aids may ultimately be disciplined for poor performance, there is no record evidence that discipline results from the trainer's aiding or re-training of a de-boner. The record establishes that it is the function of the monitors to test randomly the quality of each of the de-boners product and record and tally those results. Moreover, where quality or production issues arise with respect to de-boners, the record bears out that these issues are remedied by the Employer by re-training and not discipline. Under the circumstances here, I find the trainer is not a supervisor under the Act.

Lead Packer

The Union has not met its burden of establishing the lead packer is a supervisor under the Act. While she may ensure that the packers she works with are performing their duties correctly, her role is limited to checking to see that the correct boxes are used, that the boxes are made-up correctly, and that the correct labels are used. There is no evidence that she responsibly directs employees or assigns them work utilizing independent judgment. She is responsible for counting the number of packers and checking it against the production sheet and reporting shortages and overages of packers to Hurtt or Dagenais. She performs the same packing tasks as the other packers. There is no record evidence that she has authority to discipline packers.

Lab Technician³

The lab technician is not a supervisor under the Act. There is no record evidence that she possess any of the primary indicia. The lab technician's duties are confined to testing samples and reporting those samples to the Quality Assurance Manager who

³ At the hearing, the Union sought to exclude the lab technician on the basis of insufficient community of interest with the production employees and the "possibility" of her supervisory status. It appears that the Union abandoned her exclusion from the unit under a supervisory status theory as this theory was not further pursued at the hearing nor argued in the Union's brief. Out of judicial prudence, I address that theory here.

supervises the lab. There is a lab employee who works in the lab with her, but there is no record evidence that the lab technician supervises or oversees the lab employee in any way. The evidence in the record is that Boulter, the Quality Assurance Manager, directly supervises the lab technician and the lab employee.

Production Clerk

I find that the Union has not met its burden of showing that production clerk Alvarez is a supervisor under the Act. Contrary to the Union's assertions, Alvarez does not investigate employees. Because of her fluency in English and Spanish, Alvarez is used as an English-Spanish/Spanish-English translator by management to communicate with Spanish-speaking production employees, as are other employees. The record is clear that in translating, Alvarez herself is not investigating nor disciplining any production employee. Alvarez herself possesses no authority over the other production employees.

While it is true that as production clerical, she collects and records the presence and number of employees on any given day, she does so to compile and calculate those figures on the grand production sheet in the computer system to fulfill her production clerical duties. Those figures are used by Dagenais and other managers to assess the facility's productivity at any given time. In fulfilling her clerical duties, she is merely gathering and processing the production figures. She makes no productivity or personnel decisions based on any of that data.

COMMUNITY OF INTEREST ISSUES

Production and maintenance units are presumptively appropriate, when sought. *Appliance Supply Co.*, 127 NLRB 319, 321 (1960). The Union seeks exclusion of the lab technician, lab employee, and maintenance employees under a theory that their interests are dissimilar to those of the production employees. The Employer contends that these employees must be included in the unit found appropriate.

To determine whether or not employees possess dissimilar interests, the Board examines: (1) their functional integration; (2) their frequency of contact with other employees; (3) their interchange with other employees; (4) their degree of skill and common functions; (5) their commonality of wages, hours, and other working conditions; and (6) their shared supervision. *Publix Super Markets, Inc.*, 343 NLRB No. 109, slip op. p. 2 (2004) citing *Ore-Ida Foods*, 313 NLRB 1016 (1994), affd. 66 F.3d 328 (7th Cir. 1995). No one factor in the community of interest analysis is dispositive and the weight to be given to these factors will vary in each case depending on the industry and the plant. *American Cyanide*, 131 NLRB 909, 911 (1961).

Lab Technician

The lab technician shares a community of interest with the production employees. I am cognizant that certain factors would tend to weigh against her inclusion. The lab

technician is supervised by Boulter, and not by production supervisors or shift supervisors. She is salaried. Because she is salaried her benefits differ from those of the production employees and she is not required to punch the time clock as are the production employees. She earns more than the operators, but less than some of the maintenance employees. She spends most of her working time in the lab. She does not fill in for production employees nor does she perform their duties.

While I have considered these factors, I find they are outweighed by the totality of factors favoring the lab technician's inclusion. It is certain that the role the lab's quality assurance plays is substantially integrated into a vital part of the production process. The lab technician is instrumental in maintaining the quality of production by testing the samples of product brought to her to confirm that they meet governmental and industry standards. Though she is salaried and does not punch the time clock, she works 6:30 a.m. to 4:30 p.m., essentially the same hours as the first shift production workers. She had no specialized outside education or training. Her training was received in-house at the plant. Before attaining the lab technician position, Warner was a sorter on the production floor. The lab itself is located right off the production floor. While she spends most of her time in the lab, the lab is frequented by other production employees, namely operators and monitors who bring in samples and even conduct some tests separate and distinct from the bacteria tests conducted by Warner. She wears the same white smock that production employees wear, and she utilizes the same cafeteria and restrooms as the production employees.

Lab Employee

For similar reasons, I find the lab employee also shares a community of interest with the production workers. Like the lab technician, the lab employee is supervised by Boulter and not by production supervisors. She does not fill in for production employees or perform their duties.

However, she, too, is an integral part of the production process. She takes and records the temperature of the frozen product to confirm it the governmental and industry standards. If the temperature meets the standard, she releases it for shipping. She also tests and records the salt content of some product. Unlike the lab technician, the lab employee is paid hourly. At least half of her day is spent outside the lab performing tests and moving from production department to production department collecting production papers that touch on quality issues. She earns a little more than the boners, but not as much as the equipment operators. She must punch the time clock, and she receives the same benefits that production employees receive. Before becoming a lab employee, she was a sorter in production. She neither possessed, nor was given, any outside specialized education or training. The training she received was provided by the Employer in-house. She wears the same white smock as production employees. She shares the same cafeteria and restroom facilities with the production employees.

Maintenance Employees

I find that the maintenance employees should be included in the unit as they share a close community of interest with the production employees, and would not constitute a separate, appropriate unit with or without the inclusion of the lab technician and lab employee.

Like the lab, maintenance is substantially integrated into the production process. They start and test the principle equipment and perform preventative maintenance before production begins. During production, they are required to remain in close proximity to the production floor to minimize downtime in case of a breakdown. The maintenance employees also have a high degree of contact with production workers. During the week, they work essentially the same hours as the production employees. When a breakdown occurs on a principle piece of equipment, they are notified directly by the equipment operator. During production, they will also perform miscellaneous production tasks like collecting and forwarding production papers and tickets.

While the higher maintenance classifications earn more than most, if not all, production employees, all maintenance employees are paid hourly, punch the time clock, and receive the same benefit package as the production employees. Maintenance employees share the cafeteria and restroom facilities with the other employees.

Only two of the maintenance employees received outside technical training or education; the others have not, and no outside or special training or certifications are required by the Employer. None of the maintenance employees is licensed. At least one of the maintenance employees has progressed from production to maintenance.

I am not unmindful of factors present here that cut against the inclusion of the maintenance employees. Maintenance employees do not share common supervision with production employees; they do not fill in for nor perform the duties of production employees; and the higher classifications earn higher wages than most, if not all, production employees. I am persuaded that the degree of integration between maintenance and production, the contact between maintenance employees and production employees, and their common terms and conditions of employment outweigh the factors that cut against their inclusion or weigh in favor of finding they may constitute a separate, appropriate unit. *Publix Super Markets, Inc.*, 343 NLRB No. 109 (2004); *Buckhorn, Inc.*, 343 NLRB No. 31 (2004); *TDK Ferrites Corp.*, 342 NLRB No. 81 (2004)

CONFIDENTIAL EMPLOYEE STATUS

The Board's established test for determining whether an employee is a confidential employee is the labor nexus test: whether the employee "assist[s] and act[s] in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations. *B. F. Goodrich Co.*, 115 NLRB 722, 724 (1956). The Board's test was approved by the Supreme Court in *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981). The Board applies the

test strictly. *Goodrich* at 724. The indicia of the test are to be assessed in the conjunctive. *Weyerhaeuser Co.*, 173 NLRB 1170 (1969). The party asserting confidential status bears the burden of establishing that status. *Crest Mark Packing Co.*, 283 NLRB 999 (1987).

The Union also argues that Alvarez access to production information establishes her as a confidential employee. The production clerical's collection of production data and entering that data into the Employer's computer system does not convey confidential employee status upon her. Her role is limited to data entry. *Pullman*, 214 NLRB 762, 763 (1974) (Board will not exclude as "confidential" employees who merely have access to employer's personnel or statistical information); *Swift & Co.*, 129 NLRB 1391, 1393 (1961) (employees whose duties require their access to business information not confidential employees when those duties are performed pursuant to company policy and entail minimum discretion).

Further, the theoretical possibility that Alvarez may, at some future time, be assigned to assist management in labor relations or communicating labor relations has not been established by the record evidence and is insufficient for finding that she is a confidential employee. *American Radiator*, 119 NLRB 1715, 1719 (1958).

Under the facts of the instant matter, I find the Union has not met its burden of establishing the confidential employee status of the production clerk.

It is clear from the record that Alvarez assists management by only translating from English to Spanish and Spanish to English for management in communications with employees. Alvarez has translated for management in the context of work related investigations, communicating discipline, and reading general notices. She does not attend any management or supervisory meetings. She is not otherwise involved in personnel policies or discipline policies. She is a production clerk who management uses as a translator, a communicator. Management also uses at least two other production employees for translation, one of which works in general labor as a janitor. In short, the production clerk is not involved in personnel matters in any meaningful way. *Lincoln Park Nursing Home*, 318 NLRB 1160, 1164 (1995) (mere typing of disciplinary matters or other material relating to personnel issues does not impart confidential employee status within the meaning of Board law).

CONTRACTED EMPLOYEES

Based on *Oakwood Care Center*, 343 NLRB No. 76 (2004), I find the inclusion of contracted employees supplied by Asian Connections and G.M.M. and used by Chestertown in the same unit with Chestertown's employees would constitute a multi-employer unit and cannot be appropriate without the consent of the parties, which the Employer has declined.

There is insufficient record evidence to establish that the contracts and business dealings between Asian Connections and Chestertown and G.M.M. and Chestertown are

illusory or less than arm's length so as to convert them to single employer status. I am persuaded that Asian Connections and G.M.M. are responsible for paying their respective employees their pay and benefits, if any, and supervising their respective employees. They do not use the Employer's time clock to record their hours.

I decline to determine whether the contracted employees are the sole employees of their respective agencies or joint employees of the agencies and Chestertown. I only find that under the facts of this matter, the contracted employees are not employed by Chestertown as their sole employer. Accordingly, without the consent of all parties, I shall exclude the "contracted" employees from the unit.

CONCLUSIONS AND FINDINGS

Accordingly, given the record here in the instant matter, I will direct an election.

Based upon the entire record in this matter and in accord with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. As stipulated by the parties, the Employer is an employer as defined in Section 2(2) of the Act and is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Union, United Food and Commercial Workers Union, Local 27, is a labor organization as defined in Section 2(5) of the Act, and claims to represent certain employees of the Employer.
4. There is no prior history of collective bargaining between the Union and the Employer.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.
6. The parties stipulated that the Employer, Chestertown Foods, Inc., is a Maryland corporation with an office and place of business in Chestertown, Maryland, and is engaged in the wholesale processing of chicken. During the past twelve (12) months, a representative period, the Employer sold and shipped from its Chestertown, Maryland, facility goods valued in excess of \$50,000 directly to points outside the State of Maryland.

7. I find the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time production and maintenance employees, including APV operators, back dock checkers, coolers, cookers, de-boners, dicers, fat and stock packers, general laborers, graders, janitors, laboratory technicians, laboratory employees, lead packers, MDM operators, maintenance employees, monitors, packers, pan washers, placers, poultry loaders, production clericals, sorters, and trainers employed by the Employer at its Chestertown, Maryland, facility; but excluding shift supervisors, back dock shipping and receiving supervisors, all contracted employees, office clericals, accounting clericals, managers, guards, and supervisors as defined in the Act.⁴

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 27**. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the

⁴ Given my resolution of the all of the issues in this matter, I deny the Employer's special appeal as to its subpoena request for the Union to provide the Employer with all current collective-bargaining agreements between poultry processing employers and the Union. Accordingly, this record will not be reopened for this issue.

election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, National Labor Relations Board, Region 5, 103 South Gay Street, Baltimore, MD 21202, on or before **January 31, 2006**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (410) 962-2198. Since the list will be made available to all parties to the election, please furnish a total of two copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., E.S.T. on **February 7, 2006**. The request may not be filed by facsimile.

(SEAL)	Wayne R. Gold
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	Wayne R. Gold, Regional Director
	National Labor Relations Board
	Region 5
Dated: January 24, 2006	